In the Supreme Court of the United States

OCTOBER TERM—1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Cross-Petitioner,

v.

CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.

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Nos. ~~421, 422, 423, and 424~~.

SUPPLEMENTAL BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

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In view of the fact that the City's counsel filed an addition to the appendix of their brief during the course of the oral argument and the fact that the Court raised one or two questions which had not been raised by the City or briefed by any of the parties, we are asking leave to file this short Supplemental Brief.

1. Section 249 of Cities and Towns Act of 1905.

The City's "Addition to Appendix" sets forth Section 2 of an Act of the General Assembly of Indiana of 1911 which amended Section 249 of the Act of March 6, 1905. This is the precise section of the statute upon which the

plaintiff Todd relied in 1929 in seeking to enjoin the transfer of the Citizens Gas property to the City. In meeting this contention, the City's answer in the *Todd* case (II R. 737, Par. (1)) asserted that Section 249 of the Acts of 1905 was not applicable in view of the express provisions of Section 53 of the same Act, which authorized cities "To receive * * * public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out." The significance of this section of the Indiana statute and the City's contention in the *Todd* case is dealt with in our original brief (Pl. Br. 93-6).

The Circuit Court of Appeals adopted the City's construction of the Indiana statutes and held that such statutes authorized the City to take over the trust property without a popular vote. *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855, 865-6 (1931).

2. Plaintiff's Independent Rights to Enforce Compliance with the Lease.

The Mortgage specifically vested all rights of action thereunder in the plaintiff (Trustee) and provided that they could be specifically enforced by any court (Section XIV, I R. 46). Also, the Lease contained this specific provision (I R. 72):

> "22. The Lessee covenants to perform and observe all the covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds, contained in its *mortgage* * * *." (Emphasis supplied.)

Obviously the party entitled to enforce this obligation of the lessee must be the party who is entitled to enforce "the covenants and agreements of the Lessor [Indianapolis Gas], * * * contained in its mortgage," namely, the Trustee. One of the covenants which the lessor made expressly "to and with" the Trustee was that it would "provide for and pay" the interest on the Bonds (Section IX, I R. 44).

Under such circumstances, and particularly in view of the threat to plaintiff's rights as third party beneficiary under the Lease and to the security, arising from the agreement of March 2, 1936, between the City and Indianapolis Gas (I R. 205-7), it is clear that plaintiff had not only a separate and distinct right but an affirmative duty to protect its rights arising from the Lease.

Old Colony Trust Co. v. City of Omaha, 230 U. S. 100, 122 (1913);
Bankers Trust Co. v. Raton, 258 U. S. 328, 337 (1922);
Welden National Bank v. Smith, 86 Fed. 398, 401 (C. C. A. 2nd, 1898).

Plaintiff's independent position in this case is clear. Moreover, the City concedes that plaintiff and Indianapolis Gas are "adverse in attitude" as to a number of the issues presented (City Br. 15).

3. Effect of Amendments on Jurisdiction.

It is clear that amendments to a bill and enlargements of the original relief prayed for, in so far as they are based on facts in existence when the original bill was filed, are available in support of the jurisdiction of the court.

Norton v. Larney, 266 U. S. 511, 515-16 (1925);
Speh v. Ballard, 83 F. (2d) 809, 810 (C. C. A. 5th, 1936).

All of the conflicts between plaintiff and Indianapolis Gas enumerated in our reply brief (pp. 9-11) are based on the facts as they existed when the Bill was filed, with the possible exception of part of No. 5, namely, the right to collect unpaid interest. However, a default in the payment of interest was inevitable in view of the contract of March 2, 1936, between the City and Indianapolis Gas.

4. Certain Corrections.

A. Counsel for the City stated during the oral argument that the City had entered into possession of the Citizens Gas property, including that under lease, under a standstill agreement. It is undisputed that the City went into possession of all the property, including that under lease, on September 9, 1935 (Stip. 6 (c), II R. 622; II R. 350). In support of the statement that there was a standstill agreement on *September 9th* counsel referred to an Indianapolis Gas letter of *September 30th* in which Indianapolis Gas indicated its willingness to enter into "a mutual stipulation" (PX Stip. 66, III R. 838). When the Court inquired whether such a stipulation had been entered into, the City's counsel referred to the agreement of March 2, 1936, made more than five months later.

The only agreement between the City and Indianapolis Gas prior to March 2, 1936 is that set forth in the two letters of September 30th relating to the interest payment of October 1, 1935 (DX Stip. 64, 65, III R. 968-9). *These letters were written three weeks after the City had taken possession of the property.* The significance of these facts is discussed in our original and reply briefs (Pl. Br. 110-111; Pl. Rep. Br. 3). It is important to note in this connection that in its original brief the City claimed only that "On September 30, 1935 Indianapolis Gas agreed to make an arrangement for temporary use" (City Br. 9).

Counsel for the City argued that Finding 51 of the District Court indicated that there had been an agreement "continuously in effect since September 9, 1935" (III R. 1185). This finding was adopted substantially verbatim from the City's Requested Finding 43 (III R. 1096-7), but there is absolutely no evidence to support it and the City has never attempted to support it by any record reference.

B. In discussing the motion to strike filed by the City and Citizens Gas in the *Williams* case, counsel for the City indicated that substantial parts of the Williams complaint relating to the Lease had been stricken out. The fact is, however, as shown by the Stipulation of the parties in this case, that only a single paragraph was stricken from the complaint and that related primarily to the formation of a conspiracy to have the Public Service Commission law passed and the purposes of such conspiracy. It was affirmatively stipulated that "At the same time said court overruled all other specifications of said motion" (Stip. 14(c), II R. 631-2).

The wide scope of this motion and the limited extent to which it was granted will be apparent from an examination of the motion itself (PX Stip. 37, II R. 804-812). Only specification 2 of the motion was granted (cf. Stip. 14(c), II R. 631-2, and II R. 805-6).

After this motion to strike was granted to this limited extent, the complaint (PX Stip. 35, II R. 761-802) remained unchanged except for the elimination of the italicized language appearing on page 778.

Thus the Williams complaint still contained:

(1) The Franchise and Articles of Citizens Gas (II R. 765).

(2) The joint petition of Citizens Gas and Indianapolis Gas before the Public Service Commission (II R. 779).

(3) The full text of the Lease between Indianapolis Gas and Citizens Gas (II R. 780).

(4) The allegations relating to the invalidity of the Lease (Pars. 19, 20 (except the italicized language), 22, 23, 24, and 29) (II R. 776-791).

These were the allegations which the Supreme Court of Indiana held did not justify the admission of any evidence as to the alleged burdensomeness, improvidence, and invalidity of the Lease.

We have taken space to correct only these two of the more glaring inaccuracies in the City's oral argument.

Respectfully submitted,

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